RECORD AND BRIEFS

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In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

ON WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

BRIEF OF OUTSERVE-SLDN, INC., AMERICAN MILITARY PARTNER ASSOCIATION, AND AMERICAN VETERANS FOR EQUAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

OutServe-SLDN, Inc. ("OS-SLDN"), American Military Partner Association ("AMPA"), and American Veterans for Equal Rights ("AVER") are three of the country's largest non-profit, non-partisan legal services, policy, and watchdog organizations that serve lesbian, gay, bisexual, and transgender ("LGBT") military personnel, veterans, Department of Defense civilian personnel, and their families. OS-SLDN, AMPA, and AVER respectfully submit this brief to address the significant implications this Court's ruling will have on LGBT[2] members of the Armed Forces and their families, as well as on LGBT family members of non-LGBT service members.

OS-SLDN formed in 2012 through a merger between two organizations: Servicemembers Legal Defense Network ("SLDN") and OutServe. SLDN formed in 1993 to provide LGBT service members and veterans legal aid in response to the "Don't Ask, Don't

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part; no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] While transgender people may not be identically situated as lesbian, gay, and bisexual individuals in the military under current law, transgender people continue to serve in the military, and there are thousands who are veterans of the Armed Forces. As they would be subject to similar repercussions depending on the outcome of this case, amici include transgender people in its arguments unless otherwise noted.

Tell" law ("DADT"), 10 U.S.C. § 654, repealed by Pub. L. No. 111-321 (2010), 124 Stat. 3515. OutServe began in 2010 as an online network for LGBT service members to give voice to those silenced by DADT. OSSLDN is dedicated to bringing full LGBT equality to America's military and ending discrimination and harassment on the basis of sexual orientation and gender identity.

AMPA was founded by partners of active duty service members to connect the families of LGBT service members, support them through the challenges of military service, and advocate on their behalf. AMPA began in 2009 as a "Campaign for Military Partners" by Servicemembers United, an organization focused on repealing DADT. When DADT was repealed in 2011, Servicemembers United wound down its affairs and AMPA reorganized as an independent non-profit organization. AMPA offered support services for LGBT military families while DADT was in effect, and continues to be a leading provider after the repeal to support the unique challenges LGBT military families face. AMPA provides a supportive environment for these families to share their experiences and work together to improve their lives. AMPA also advocates for policy changes to improve the lives of LGBT service members and their families.

AVER is the oldest and largest chapter-based, all-volunteer national LGBT Veterans Service Organization ("VSO") and the only LGBT VSO recognized by the Veterans Administration. AVER supports and advocates on behalf of LGBT active duty, reserve, and veteran United States military members, and has done so since 1990. With a particular focus on LGBT military personnel who have faced historical

disenfranchisement by DADT and other discriminatory policies and laws governing military service and benefits, AVER advocates for full equal rights and equitable treatment for service members and veterans. As a VSO, AVER provides advice, support, and referrals to LGBT veterans regarding their rights and benefits; helps veterans procure the documents they need to access Veterans Affairs ("VA") services; works closely with the VA to ensure the provision of competent healthcare; and assists members discharged under DADT to upgrade their discharge status.

OS-SLDN, AMPA, and AVER have a unique understanding of the challenges faced by the LGBT populations they serve. Since 1993, OS-SLDN and its predecessor entities have responded to more than 12,000 requests for assistance. Currently OS-SLDN advocates on behalf of tens of thousands of active duty LGBT service members and LGBT veterans, as well as service members' and veterans' families and loved ones. AMPA, moreover, today has more than 40,000 members and AVER has over 50,000. OS-SLDN has filed lawsuits challenging laws and regulations that discriminate against and stigmatize LGBT service members, including challenges to DADT, regulations prohibiting same-sex military spouses from receiving spousal benefits, and, most recently, the ban on openly transgender people serving in the United States military. The organizations also have submitted amici briefs to this Court in cases that directly affected

LGBT service members, including *United States v. Windsor*[3] and *Obergefell v. Hodges*[4].

SUMMARY OF ARGUMENT

Amici agree with respondents that permitting places of public accommodation to deny service on the basis of a customer's sexual orientation is inconsistent with longstanding precedent prohibiting businesses from declining to serve potential customers because of the religious or expressive preferences of a business owner or his employees. Amici also agree with respondents that any decision permitting a business to deny service on the basis of religious or expressive preferences would have far reaching consequences beyond sexual orientation and bakeshops.

Amici do not submit this brief to repeat those arguments. Rather, amici submit this brief to address the pivotal role that public accommodations laws play in ensuring that LGBT service members and their families enjoy equal access to goods and services, as well as the serious practical harm that a decision in petitioners' favor would impose on members of the military and their families. Amici also submit this brief to address the harm that a decision in petitioners' favor would impose on military recruitment and retention,

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[3] Brief of Amicus Curiae OutServe-SLDN Inc. on the Merits in Support of Respondent Edith Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 785634.

[4] Brief of Amicus Curiae OutServe-Servicemembers Legal Defense Network and American Military Partner Association in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556 et al.), 2015 WL 981531.

and the important national security interests those goals serve.

ARGUMENT

I. LGBT SERVICE MEMBERS AND THEIR FAMILIES ARE INTEGRAL TO THE UNITED STATES MILITARY AND VITAL TO ITS MISSION.

A. LGBT Service Members Are Integral To The Military.

LGBT service members are an essential part of America's Armed Forces. Over 71,000 current military personnel identify as lesbian, gay, or bisexual. *See* Jeremy T. Goldbach & Carl Andrew Castro, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Service Members: Life After Don't Ask, Don't Tell*, Current Psychiatry Rep. 18:56 at 1 (online ed. Apr. 16, 2016). As many as 15,500 additional service members identify as transgender. Gary J. Gates & Jody L. Herman, The Williams Institute, *Transgender Military Service in the United States* 1 (May 2014), https://willimsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf (estimating 15,500); Agnes Gereben Schaefer et al., Rand Corp., *Assessing the Implications of Allowing Transgender Personal to Serve Openly* at x-xi (2016), https://www.rand.org/pubs/research_reports/RR1530.html (estimating 6,600).

LGBT people serve in every branch of the Armed Forces. Many are highly decorated. Technical Sergeant Leonard P. Matlovich—thought to be the first gay service member to purposefully out himself to the military—received the Purple Heart and the Bronze Star. Lily Rothman, *How a Closeted Air Force*

Sergeant Became the Face of Gay Rights, Time (Sept. 8, 2015), http://time.com/4019076/40-years-leonard-matlovich/. Eric Alva, an openly gay retired staff sergeant in the United States Marine Corps, received the Purple Heart after being the first Marine seriously injured during the Iraq War and losing his right leg. *Don't Ask, Don't Tell Review: Hearing before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 110th Cong. 6-7 (2008) (statement of Staff Sgt. Eric Alva, USMC, (Ret.)). Major General Tammy Smith, an openly gay senior officer, has received, among other awards, the Bronze Star, the Legion of Merit Medal, Meritorious Service Medals, Army Commendation Medals, and the Combat Action Badge. *Major General Tammy S. Smith, Deputy Commanding General – Sustainment, Eighth Army*, Eighth Army, http://8tharmy.korea.army.mil/site/leadership/leaders-MG-smith.asp (last visited Oct. 29, 2017). Countless others have been cited for their bravery, honor, and valor.

In light of the number of LGBT individuals serving in the military today, and their strong record of distinguished service to this country, it should be unsurprising that the military has concluded that the inclusion of openly-serving gay and lesbian service members in the Armed Forces has enhanced the military's ability to achieve its mission. *See* Aaron Belkin et al., Palm Center: Blueprints for Sound Public Policy, *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness* 4 (Sept. 20, 2012), http://archive.palmcenter.org/files/One%20Year%20Out_0.pdf. Professors at America's military academies have concluded, therefore, that the repeal of DADT "enhanced the military's ability to pursue its

mission" and brought a "greater openness and honest[y] . . . [that] seem[s] to have promoted increased understanding, respect, and acceptance." *Id.*

Military leaders have repeatedly recognized the important contributions that gay and lesbian service members make to the military's mission.[5] Every Secretary of Defense serving since the repeal of DADT has acknowledged the important role that LGBT Sailors, Soldiers, Airmen, Marines, and Coast Guardsmen play in supporting the military's mission. In 2013, then-Secretary of Defense Leon Panetta proclaimed that allowing service members in same-sex relationships to serve openly "strengthened our military community." Press Release, U.S. Dep't of Defense, Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners (Feb. 11, 2013), http://archive.defense.gov

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[5] Further, all branches of the United States military acknowledge the importance of LGBT service members to the military's mission and national security objectives. *See, e.g.*, Chief of Navy Personnel Public Affairs, *Navy Celebrates 2017 LGBT Pride Month*, Dep't of the Navy (May 31, 2017), http://www.navy.mil/submit/display.asp?story_id=100788 ("The LGBT community is part of One Navy Team that contributes their diverse talents, skills and service to the strength of the force. 'To remain the finest seagoing fighting force, the Navy needs men and women who are the right fit for the right job regardless of race, gender, sexual orientation, creed or gender identity.'") (quoting Capt. Candace Eckert, Special Assistant for Inclusion and Diversity)); U.S. Air Force, *SECAF 2016 LGBT Message* at 1:08, YouTube (June 8, 2016), https://www.youtube.com/watch?time_continue=113&v=94IKysQ4qYg (Secretary of the Air Force Deborah James: "[W]e now depend on diversity of thought, background, and culture. The things that make us unique are the same things that make us strong.").

/releases/release.aspx?releaseid=15809. The same year, Chuck Hagel—the 24th United States Secretary of Defense—recognized that "[g]ay and lesbian service members and LGBT civilians are integral to America's Armed Forces." News Transcript, U.S. Dep't of Defense Press Operations, Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262. His successor, Defense Secretary Ash Carter, reemphasized the importance of LGBT inclusion during a 2016 speech: "Throughout our history, brave LGBT soldiers, sailors, airmen, coast guardsmen, and marines have served and fought for our nation. Their readiness and willingness to serve has made our military stronger and our nation safer." U.S. Dep't of Defense, Secretary of Defense Message, LGBT Pride Month Message (June 7, 2016), https://www.defense.gov/News/Speeches/Speech-View/Article/793510/lgbt-pride-month-message/. And in 2017, Defense Secretary James Mattis testified during his Senate confirmation hearing that "military service is a touchstone for patriots of whatever stripe," including those who identify as LGBT. *Stenographic Tr. Before the S. Comm. on Armed Services to Conduct a Confirmation Hrg. on the Expected Nomination of Mr. James N. Mattis to be Secretary of Defense*, 115th Cong. 64-65, 77 (2017), https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

Civilian leaders also have affirmed that the participation of LGBT Americans in the Armed Forces promotes the important national security needs and interests of the United States. As President Obama stated, "openly gay, lesbian and bisexual men and

women in uniform make our military stronger and America safer." POTUS 44, *Five Years Since Repealing 'Don't Ask, Don't Tell*, Facebook (Dec. 22, 2015), https://www.facebook.com/notes/potus-44/five-years-since-repealing-dont-ask-dont-tell/437067553149757/.[6] There is no question, therefore, that the inclusion and retention of LGBT service members serves important military objectives and the long-term national security interests of the United States.

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[6] As Vice President Biden also explained, now-discarded policies that discouraged service by openly-LGBT Americans "weaken[ed] national security, diminished our ability to have military readiness, and violate[d] the fundamental American principle of fairness and equality." Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a. Senator Lisa Murkowski agreed, explaining that "America is the loser when it denies those who are willing to make the great sacrifices demanded of our men and women in uniform the opportunity to do so on grounds of sexual orientation." Press Release, Sen. Lisa Murkowski, Murkowski Statement on Don't Ask, Don't Tell (Dec. 8, 2010), https://www.murkowski.senate.gov/press/release/murkowski-statement-on-dont-ask-dont-tell. Senator Susan Collins has expressed the same, explaining that "[The United States'] Armed Forces should welcome the service of any qualified individual who is willing and capable of serving our country." Joe Lawlor, *Trump's transgender military ban elicits strong response in Maine*, Portland Press Herald (updated July 27, 2017), http://www.centralmaine.com/2017/07/26/trumps-transgender-military-ban-elicits-strong-response-in-maine.

B. LGBT Military Family Members Are Likewise Integral To The Military.

Military families play a critical role in supporting service members' morale and readiness. They also positively influence military enrollment and retention. As a result, military families are widely recognized as the force behind the force and a key contributor to national security. Karen Jowers, *Dunford: Military families key to national security*, Military Times (Oct. 11, 2016), https://www.militarytimes.com/spouse/2016/10/11/dunford-military-families-key-to-national-security/ (excerpting from a speech given by Joint Chiefs Chairman Gen. Dunford on the importance of the military family). The families of LGBT service members, and the LGBT family members of non-LGBT service members, are no exception. *See* Shannon Collins, *Senior Leaders Discuss Importance of Supporting Military Children*, U.S. Dep't of Defense (July 31, 2015), https://www.defense.gov/News/Article/Article/612730/.

Many non-LGBT service members have LGBT children. Recent studies indicate 4.1% of the U.S. adult population identifies as LGBT—10 million adult Americans. Gary J. Gates, *In US, More Adults Identifying as LGBT*, GALLUP News (Jan. 11, 2017), http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx. As younger Americans come of age in an era of increased societal acceptance for LGBT persons, the number of openly identifying LGBT Americans continues to grow. *Id.* Indeed, fully 7.3% of Americans aged 18 to 37—those of military service age—identify as LGBT. *Id.* Assuming a similar share of the 1.75 million children whose parents are on active duty are LGBT, active duty servicemen and women are raising

over 127,000 LGBT children—sharply increasing the number of military families with at least one immediate LGBT member. *See* 2015 Demographics Profile Of The Military at vi, U.S. Dep't of Defense, http://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf (last visited Oct. 26, 2017).

The military demands sacrifice not only from service members, but also from their families. Families routinely are compelled to relocate across (and sometimes outside of) the United States based on national security, rather than their own geographic preferences. In so doing, they often are forced to live far apart from extended family, friends, and preexisting communities and support networks. Owing to the military's diversity, it is commonplace for some military families to be stationed in areas around the country where a substantial majority of the local civilian population may not share their ethnic background, or religious views, and may be less accepting of their LGBT identity.

Military members and their families also move frequently, and, when they move, they move farther and more often than their civilian counterparts. *See* Margaret C. Harrell et al., Rand National Defense Research Inst., *Working Around the Military: Challenges to Military Spouse Employment and Education* 18-20 (2004), https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG196.pdf. The Rand Corporation has observed that during a five-year study period, less than half of civilian families moved, while 90% of military families moved. *Id.* at 18-19. Moreover, most military moves were across state lines. *Id.* at 19. As a result, it is commonplace for

members of the Armed Forces to experience wide variations in local culture and law over the course of their service.

Adding to the challenges above, service members are not infrequently separated from their families during times of conflict, parting parents from children and spouses from one another during stressful extended periods in which the service member is deployed abroad to hostile areas in furtherance of the country's national security needs. When service members' duties require separation from their family, a "dominant concern" of those members is "the impact of separation on their families and worries about their spouses' ability to cope with deployment-related challenges." *See* Institute of Medicine of the National Academies, *Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families* 274 (2013), https://www.ncbi.nlm.nih.gov/books/NBK206864/pdf/Bookshelf_NBK206864.pdf.

As the Armed Forces recognize, helping military families to face and overcome the burdens imposed on military families as a result of service is essential to maintaining a robust and skilled volunteer military. Sergeant Major Ronald L. Green testified on February 14, 2017, to the Senate Committee on the Armed Forces on behalf of the Navy that, "[t]aking care of Marines and their families is a key element of overall readiness and combat effectiveness. The adage 'we recruit Marines, we retain families' remains as true today as ever." Statement of Sergeant Major Ronald L. Green Before the Subcomm. on Personnel of the S. Armed Services Comm. on Single Servicemembers and Family Readiness Program 3 (2017),

https://www.armed-services.senate.gov/imo/media/doc/Green_02-14-17.pdf.[7]

Indeed, because military families are crucial to morale, readiness, and retention, "[w]ere it not for the strength of [military] families, were it not for the[ir] willingness to sacrifice, our nation wouldn't be safe." *See* Jowers, *supra*, at 8-9 (quoting Joint Chiefs Chairman Gen. Dunford). As General Joseph Dunford, the Chairman of the Joint Chiefs of Staff, professed, "[the Armed Forces] couldn't possibly do what [it does] without military families." *Id.*

II. PERMITTING THE DENIAL OF PUBLIC ACCOMMODATIONS TO LGBT CUSTOMERS WOULD BURDEN LGBT SERVICE MEMBERS AND MILITARY FAMILIES AND HINDER THE MILITARY'S MISSION.

Although attitudes across the country are rapidly evolving, the experience of being openly LGBT continues to vary dramatically depending on where one lives within it. *See* Frank Bruni, *The Worst (and Best) Places To Be Gay In America*, Opinion, N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/interactive/

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[7] This sentiment is widely shared throughout the military. *See, e.g.*, United States Air Force, Presentation Before the Senate Armed Services Subcomm. on Military Personnel, *Review of Single Servicemember and Military Family Readiness Programs: Witness Statement of CMSAF James A. Cody* 7 (Feb. 14, 2017), https://www.armed-services.senate.gov/imo/media/doc/Cody_02-14-17.pdf ("Families are often the catalyst to an Airman's decision to stay or leave the Air Force. These selfless families make many sacrifices, and the Air Force remains clear in its commitment to taking care of them.").

2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html. Members of the Armed Forces, however, are stationed according to military necessity, rather than personal preference. In order to support the military's mission, they cannot choose to live only in areas where local attitudes towards LGBT people are more accepting. Instead, many LGBT service members and their families will be stationed in areas where local attitudes towards same-sex relationships, marriage, and child raising are less accepting than the national mean.

In addition, many military installations are located in out-of-the-way areas in which the local alternatives for acquiring essential goods and services are limited—compounding the impact if any business is permitted to decline to serve LGBT customers on the basis of the business owner's or employee's beliefs. As a result, public accommodations laws play a pivotal role in protecting LGBT service members and their families from harmful discrimination and ensuring that they receive equal access to needed goods and services.

Permitting businesses to opt out from serving LGBT service members or LGBT military dependents on the basis of a business owner's asserted religious or expressive interests would undercut the crucial protection afforded by public accommodations laws and impose unique burdens on LGBT military families—forcing them to travel greater distances or work harder to obtain goods and services freely available to their non-LGBT counterparts. And because of the paucity of alternatives in many areas in which service members are stationed, permitting what few local businesses do exist to opt-out from serving LGBT service members and their families would effectively

result in the denial of those goods and services to LGBT service members and their families altogether.

Permitting businesses to deny service to LGBT members and their families would inevitably subject members of the Armed Forces and their families to "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments[;] . . . the humiliation, frustration, and embarrassment" experienced on account of his or her identity. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, pt. 1, at 16 (1964)). However unwarranted and distasteful that dignitary harm is when imposed on any American, it is particularly unconscionable when imposed on members of the Armed Forces and their families—who sacrifice deeply in service of their country and their countrymen. Yet the result sought by petitioners would provide constitutional sanction to a world in which LGBT service members may be required to give their lives thousands of miles from home, but local bakeshops could refuse to bake cakes for their children's birthdays and local florists could refuse to arrange flowers for their return home.

Providing constitutional sanction to such discrimination against LGBT service members and their families would not only make day-to-day life significantly more tenuous and onerous for LGBT military families—it would undermine the long-term national security interests of the United States. Subjecting service members and military families to increased burdens and dignitary harms as the price of military service would weaken the force behind the force, harm morale and military readiness, and

frustrate recruitment and retention, all at a cost to the military's important mission.

A. Public Accommodations Laws Play A Crucial Role In Protecting LGBT Service Members And Their Families From Discrimination And Ensuring Their Access To Goods And Services.

To serve the military's needs, many LGBT families are stationed in military installations located far from major cities. In many such locations, local options for goods and services are limited, underscoring the importance of ensuring that members of the Armed Forces and their families enjoy equal access to the few alternatives available. Public accommodations laws currently serve just that function—providing assurance that LGBT service members will not be turned away on account of their identities or partners. The result advocated by petitioners would eliminate that protection—jeopardizing military families' access to goods and services and exposing them to harmful discrimination.

That risk is exacerbated by the fact that many military installations are located in areas within the United States in which local attitudes towards LGBT identities and relationships are less accepting than the national mean or the mean within that state. In locations where many maintain unfavorable views towards LGBT relationships and there are few local alternatives exist for obtaining goods and services, the impact of permitting businesses to opt out from serving LGBT customers would be dramatic.

For instance, Naval Air Weapons Station China Lake—the largest Navy landholding in the world,

covering an area larger than the State of Rhode Island—is located in the Mojave Desert, 150 miles northeast of Los Angeles. CNIC, *Naval Air Weapons Station China Lake*, https://www.cnic.navy.mil/regions/cnrsw/installations/naws_china_lake.html (last visited Oct. 26, 2017). The cities closest to China Lake are small, rural locations in Kern County, California—a county whose residents less than 10 years ago voted overwhelmingly to pass a constitutional amendment affirmatively stripping the right to marry from LGBT couples who already had such a right. County of Kern, Kern County Election Results, Prop 8 Eliminates Right of Same-Sex Couples to Marry (Nov. 25, 2008), http://elections.co.kern.ca.us/elections/results/nov08/.

If the few businesses in and around China Lake were permitted to reject LGBT service members or their families, the consequences would be stark. Because China Lake Navy Base is served by only two specialty cake shops, a decision by the two bakers in those shops not to serve LGBT service members or their families would leave LGBT military families without any local alternatives—converting planning for even the simplest celebrations into onerous undertakings. Similarly, a decision by the only two florists in China Lake to refuse to sell flowers intended to celebrate an LGBT relationship, would leave LGBT service members without any option for sending roses to their partners on Valentine's Day, an anniversary, or any other meaningful occasion. Each time an LGBT service member would be turned away, he or she would not merely lose access to goods and services that are important to one's family life, but would also suffer a substantial dignitary harm.

Currently, California's public accommodation law ensures that China Lake's businesses treat LGBT service members and LGBT dependents of service members equally to their fellow citizens. *See* Cal. Civ. Code § 51(b). The California Supreme Court has refused to recognize exemptions to those laws based on even sincerely held religious beliefs. *See N. Coast Women's Care Med. Grp. v. San Diego Superior Court*, 189 P.3d 959, 962 (2008) (holding that the rights to religious freedom and free speech do not exempt physicians from complying with generally applicable laws prohibiting discrimination based on sexual orientation). Granting businesses an opt-out from civil-rights laws of general applicability would completely eliminate the protection that California's laws provide to China Lake's LGBT service members and their families.

Nor are such concerns limited, of course, to China Lake. Countless other military installations are located in areas of the country where creating an opt-out from public accommodations laws could have an immediate and significant impact. Take the United States Coast Guard's ("USCG") and the Army National Guard's installations in Juneau, Alaska.[8] The USCG

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[8] China Lake and Juneau are not isolated examples of cities with military installations where public accommodations laws protect LGBT persons and the majority of citizens have acted to restrict LGBT rights. *See, e.g.*, Fairchild Air Force Base: A Brief History (Mar. 15, 2016), http://www.fairchild.af.mil/About/Fact-Sheets/Display/Article/238991/fairchild-air-force-base-a-brief-history/ (Fairchild Air Force Base near Spokane, WA); Washington Secretary of State, November 06, 2012 General Election Results: Referendum Measure No. 74 Concerns marriage

runs its Northwest operations primarily out of Juneau and employs over 2,000 active duty and reserve Guardsmen and Guardswomen, while the Army National Guard also maintains a significant presence in the city. Military Bases.com, *USCG Juneau Coast Guard Base in Juneau, AK*, https://militarybases.com/alaska/juneau/ (last visited Oct. 26, 2017); *see* Alaska Department of Military & Veterans Affairs, *2013 Annual Report* 12, https://dmva.alaska.gov/Press/AnnualReports/DMVAAnnualReport2013_web.pdf; *see also* United States Coast Guard, Dep't of Homeland Security, *Mission*, http://www.pacificarea.uscg.mil/Our-Organization/District-17/ (last visited Oct. 26, 2017). Juneau is unique in that it is the state capital but geographically isolated, without a single road in or out and served only by aircraft and boat. Alaska, Official City Sites.org, http://officialcitysites.org/us/states/alaska/ (last visited Oct. 26, 2017). Juneau is also a city that affords public accommodation protections to LGBT people. Compiled Laws of the City and Borough of Juneau, Alaska, ch. 41.05.020 – Discrimination in public accommodations, https://library.municode.com/ak/juneau/codes/code_of_ordinances?nodeId=PTIICOOR_TIT41EQRI (prohibiting discrimination on the basis of, *inter alia*, sexual orientation and gender identity).

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for same-sex couples - County Results, http://results.vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples_ByCounty.html (last updated Nov. 27, 2012) (city and adjacent county voted in 2012 by 55% and 70%, respectively to restrict recognition of marital rights while the state provides public accommodation protection); Wash. Rev. Code § 49.60.215.

Although Juneau's laws currently protect LGBT service members and their families, the city is located in a state where many individuals have historically maintained less favorable attitudes about same-sex marriage and LGBT identity. Indeed, nearly 20 years ago, a supermajority of Alaskans voted to preemptively ban same-sex marriage—the first state in the nation to do so. Saeed Ahmed, *Judge overturns Alaska's same-sex marriage ban that dates to 1998*, CNN (Jan. 2, 2015), http://www.cnn.com/2014/10/13/us/alaska-same-sex-marriage/; Election Summary Report, State of Alaska 1998 General Election, Official Results at 6 (Dec. 1, 1998), http://elections.alaska.gov/Core/Archive/98GENR/results.pdf.

Given these facts, LGBT service members and their families face a stark reality in cities like Juneau: allowing businesses to opt-out of serving them would legalize discrimination but leave them without alternatives for basic services unless they are willing to board a plane or boat. In short, without public accommodations laws, LGBT service members and their families will be denied access to goods and services.

B. Permitting Businesses To Deny Goods And Services To LGBT Americans On The Basis Of Religious Or Expressive Interests Will Significantly Harm Service Members And Their Families.

Petitioners and the government both advocate for broad (although differently-bounded) exceptions to public accommodations laws. But regardless of the scope of the exception created, awarding constitutional protection to a business's decision to deny LGBT Americans goods or services would impose significant

and heightened hardships on LGBT service members and other military families with LGBT members.

1. *A public accommodations opt-out would preclude LGBT service members from obtaining vital services.*

If a constitutional opt-out from public accommodations laws were created that reached no further than the provision of goods or services at a reception for a same-sex marriage, even that would be paradigm shifting. This Court recently acknowledged "the transcendent importance of marriage." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-94 (2015). As this Court recognized, "rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations." *Id.* at 2594. But under petitioners' view, nearly every traditional feature of a wedding celebration carries expressive quality, from the invitations announcing the celebration, to the floral arrangements gracing a reception, to the band playing a couple's first song, to the wedding cake eaten by the guests, to the photographer recording the event. *See* Petr's Br. 18-19 (contending that pictures, drawings, engravings, music, clothing, and baking carry are expressive activities). To hold that LGBT people have the right to marry, but no right to celebrate it, diminishes the equality and dignity envisioned just two years ago. *Obergefell*, 135 S. Ct. at 2594.

LGBT service members would particularly suffer from such disparate treatment. Although it is commonplace for many service members to get married at the location in which they are serving, a local ceremony and reception—close to those with whom they serve—could be placed out of reach for LGBT

service members if the few local businesses offering the goods and services commonly provided during a wedding were permitted to refuse service on the basis of asserted religious or expressive views.

And of course, any exception to public accommodations law could not, in reality, be cabined to goods and services for same-sex weddings alone. The government, for its part, asserts that an exception should extend only to activities that purportedly require someone to create an "inherently communicative" form of expression or to participate actively in a ceremony or expressive event. Br. for the United States as Amicus Curiae Supporting Pet'rs 21-22. But even if such a line could be easily drawn—and it cannot, *see infra* at 26—the routine-but-monumental events of daily life would be made substantially more difficult for LGBT service members and their families: A photographer could refuse to take a family portrait for military families with an LGBT member; a restaurant could refuse to bring out a celebratory desert for a lesbian couple with a candle and "Happy Anniversary!" decoration; a local daycare or preschool could refuse to put up pictures of a child's same-sex parents next to the pictures of other children's opposite-sex parents; interior decorators and landscaping services could restrict themselves to non-LGBT households; a card printer could decline to assist in the creation of a birth announcement or adoption by a same-sex couple. And the list goes on and on. Particularly because of the limited alternatives for securing such services at the countless military stations located in smaller, more rural communities, such a result would impose substantial practical burdens on LGBT families—making life that much

more difficult for families which already make tremendous sacrifices in service of their country.[9]

Nor is the government's line clear or easy to maintain. Although the government suggests that many businesses do not offer goods or services with a sufficiently expressive component to invoke an exception to public accommodations laws, *see* Br. for United States 21-22, it advances no meaningful basis for distinguishing between those that do and those that do not. For example, the government offers no persuasive explanation for why a cake decorator can refuse to design a cake, but a banquet hall cannot refuse to decorate its facility in celebration of a same-sex wedding. The government's so-called "limited" exception would lead to widespread litigation, inconsistent rules in different localities, and substantial uncertainty and practical burdens for LGBT military families. Military members and their families—who routinely are made to relocate—would face added hardships from the uncertainty and inevitably conflicting legal constructions that would be afforded such a rule in different jurisdictions. *See supra.*

The even broader religious-based exception advocated by petitioners would only exacerbate the harm on LGBT service members—by affording constitutional sanction to a business's decision to decline to serve LGBT persons regardless of whether

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[9] It is difficult to see how any ruling permitting an exception to the anti-discrimination mandate in public accommodations laws could be limited to same-sex marriage or even sexual orientation. A ruling for petitioners would inevitably subject other service members to discrimination based on race, gender, disability, or even their country of birth.

the goods or services at issue are purportedly expressive in nature. Particularly in the smaller, rural communities in which many military installations are located, it is almost inconceivable that such a world would not result in at least some denials of service to LGBT service members and LGBT military dependents.

It is no answer to say that service members or their families can adjust to the results advocated by petitioners or the government by working harder or traveling farther to obtain the goods and services they need. Ready alternatives will not always be available; and even when they are, the burden of traveling hours each time one orders a cake or purchases flowers—where one's fellow citizens need only walk down the street—is an injury in its own right.

2. *Any opt-out creates an irreversible dignitary harm for LGBT military members.*

The harm to LGBT service members that would result if the decision below is reversed goes well beyond impeding access to basic goods and services and causes more than mere inconvenience. This Court has recognized the irreparable harm to one's dignity that results from discrimination and the denial of service:

> "The primary purpose of [anti-discrimination laws], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the

> humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."

Heart of Atlanta Motel, 379 U.S. at 291-92 (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, pt. 1, at 16 (1964)).

If businesses are permitted to decline to serve customers on account of their views about LGBT identities and relationships, officially sanctioned discrimination will become a renewed reality for LGBT service members and their families. This Court has recognized the societal cost of such indignity: discrimination on the basis of one's identity, it has said, "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). "[Those] concerns are strongly implicated with respect to ... discrimination in the allocation of publicly available goods and services." *Id.* And because LGBT service members and military families have no option to relocate to another area of the country where attitudes towards LGBT may be more favorable and alternatives sources of goods and services more readily available, the impact of the discrimination is exponentially greater.

That dignitary harm is separate from the tangible harm that follows from the loss a specific good or service, and one this Court has repeatedly acknowledged as irreversible in many contexts, including gender,[10] disability,[11] and civil rights generally[12]. Most recently, this Court recognized importance of equal treatment to the dignity of LGBT people [13]:

> the right to marry conferred upon [LGBT couples] a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community

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[10] *Roberts*, 468 U.S. at 625 (sex discrimination "thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life").

[11] *See Tennessee v. Lane*, 541 U.S. 509, 537-38 (2004) (Souter, J., concurring) (upholding the Americans with Disabilities Act because the Court recognized the dignitary harm suffered by persons with disabilities).

[12] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (recognizing that the civil rights movement and the Civil War was about dignity as well as equality).

[13] *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (finding that restricting the definition of marriage to opposite-sex couples resulted in "injury and indignity" for same-sex couples); *Obergefell*, 135 S. Ct. at 2599 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

United States v. Windsor, 133 S. Ct. 2675, 2692 (2013). This statement is no less true today than it was four years ago. There is no reason to abandon it now.

The potential availability of alternative, "non-discriminatory" accommodations does not undo this dignitary harm. The possibility that some other baker might be willing to make a wedding or birthday cake for an LGBT service member after he or she is initially refused service does not undo the harm. The sting and shame of being turned away based on one's innate characteristics does not abate merely because a wholly different business later treats one with basic human decency.

And again, the realities of military service do not often leave an individual with ample opportunity to seek and obtain alternative accommodations. An Air Force pilot stationed in Colorado Springs, who rushes to get married before deployment to a war zone, should not suffer because a cake shop refused service and the airman does not have time to identify an alternative; the airman should not have to face the humiliation of being turned away because of the gender of his or her fiancé. The injury accrued when turned away by a business during life's most precious, most joyous, or even most anxious times is not lessened merely because someone else, somewhere else, may be willing to serve them.

This dignitary harm is not hypothetical; it is illustrated by the kinds of experiences LGBT individuals face in localities where laws do not prohibit discrimination in public accommodations against them. For example, in May 2017, a funeral home in Mississippi refused to cremate an 86-year-old man because he was formerly married to a man. Emanuella

Grinberg. *Funeral home refused to cremate gay man, lawsuit alleges*, CNN (May 2, 2017), http://www.cnn.com/2017/05/02/health/mississippi-funeral-home-gay-couple-lawsuit/. The deceased's husband had to travel 90 miles to find a crematorium that would accept his spouse's body after the funeral home with which he previously made arrangements refused. *Id.* In another incident, a hotel in Pennsylvania refused to host a same-sex couple's wedding, but hoped they found "somewhere [else] that will fulfill all [their] wedding dreams." David Falchek, *Venue refused to serve gays; sets off social media* firestorm, The Times-Tribune (July 11, 2014), http://thetimes-tribune.com/news/venue-refused-to-serve-gays-sets-off-social-media-firestorm-1.1717180. A ruling in petitioners' favor not only would make these stories distressingly commonplace, but afford them constitutional endorsement. To permit businesses to exclude groups of Americans from places of public accommodation on account of their identity would be to promote a segregated commercial landscape in which LGBT service members and their families could be constitutionally treated as second class citizens. Such a result would not vindicate constitutional principles, but pervert them.

C. Affording Places Of Public Accommodations The Right To Discriminate Would Frustrate Military Policies By Damaging Morale, Burdening Military Families, Discouraging Recruitment, And Jeopardizing Retention.

The military loses as well. Tens of thousands of members of the Armed Services identify as LGBT,

serving across every branch of the military in nearly every conceivable role. Tens, if not hundreds, of thousands of additional members of the military are likely to have LGBT dependents. Eliminating the protection afforded by public accommodations laws would not only harm those service members and military family members, however. It would harm the long-term national security interests of the United States. Empirical data suggest morale will erode and experience shows that enlistment and retention will suffer. Such results would weaken national security, diminish military readiness, and frustrate the military's important mission.

1. *Permitting an opt-out would harm military morale.*

Military morale would suffer under petitioners' system. As explained, military service frequently requires LGBT Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen, as well as other military families with LGBT members, to live in areas of the country where alternatives for obtaining goods and services are few and local attitudes towards LGBT identity may be unfavorable. The world petitioners seek to create would expose those service members and military families to a heightened risk of discrimination and dignitary harm. As those individuals encounter discrimination in the areas in which they are required to live as a product of their military service, morale would suffer.

Military morale closely aligns with feelings of worth and importance. *See, e.g.*, Ted Thornhill, *America's rusting nuclear arsenal: Behind the blast doors at USAF bases that reveal aging weapons and low morale of missile crews*, DailyMail.com (July 8, 2014),

http://www.dailymail.co.uk/news/article-2684493/The-problems-nuclear-Behind-scenes-US-army-bases-reveal-ageing-weapons-low-morale-missileers.html. As one defense consultant put it, "[o]ne of the reasons for . . . low morale is that [service members] feel unimportant, and they are often treated as such, very openly." *Id.*

When members of the military feel ignored or unimportant, morale suffers. Permitting businesses to deny an LGBT member of the Armed Forces service on account of his or her sexual orientation would produce precisely that result—damaging morale by treating LGBT members of the Armed Forces and their families different from their fellow citizens and subjecting them to heightened risk of exclusion and discrimination in the communities in which they are required to serve. Just as racial discrimination negatively impacted military morale historically, so too would affording constitutional imprimatur to discrimination on the basis of sexual orientation.

"Sexual orientation discrimination harms not only the dignity of the immediate victim of the discriminatory act but also the dignity and autonomy of those who, fearing such discrimination, feel forced to comply with heterosexual norms." Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. Penn. L. Rev. 1497, 1534 (2015). Indeed, it is likely that the result petitioners seek would incentivize LGBT service members to hide their sexual orientation to avoid service refusals. As experience with DADT makes clear, however, forcing LGBT service members to deny their identity is a tried-and-failed strategy proven to

lower morale. Indeed, a study by the University of Southern California School of Social Work found "concealment of [one's] sexual orientation while in the service was associated with higher rates of depression and PTSD." *See* Goldbach & Castro, *supra*, at 2.

By contrast, the military found that the repeal of DADT promoted the kind of respect and acceptance that strengthens morale. Then Secretary of Defense Chuck Hagel memorialized this sentiment in a June 2013 address:

> Our nation has always benefited from the service of gay and lesbian soldiers, sailors, airmen, and coast guardsmen, and Marines. Now they can serve openly, with full honor, integrity and respect. This makes our military and our nation stronger; much stronger. The Department of Defense is very proud of its contributions to our nation's security. We are very proud of everything the gay and lesbian community have contributed and continue to contribute. With their service, we are moving closer to fulfilling the country's founding vision, that all of us are created equal.

U.S. Dep't of Defense, News Transcript: Press Operations, *Presenters: Secretary of Defense Chuck Hagel; Senior Adviser to the President and Chair Valerie Jarrett, White House Council On Women And Girls; Acting Secretary Of The Air Force Eric Fanning* (June 25, 2013), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262.

Putting LGBT service members and their families—the force behind the force—to the intolerable choice of concealing their identity or having to drive an additional hour to obtain basic goods and services is bad for morale. And to the extent that such discrimination forces LGBT service members back into the proverbial closet, it would merely restore many of the deleterious effects of DADT, while sacrificing the gains to military morale and readiness that the military itself recognized came about from permitting LGBT members of the Armed Forces to serve openly.

2. *Permitting an opt-out would undermine the military's ability to recruit and retain.*

Recruiting and retaining the best people is essential to maintaining the United States' all-volunteer military. "The [military] understands that in order to attract and retain top quality soldiers, it must provide a quality of life comparable to that in the civilian community." Joanne Marshall-Mies, David Westhuis & Richard Fafara, *US Army Morale, Welfare and Recreation (MWR) Programmes: Links to Readiness and Retention*, Res Militaris 3 (2011), http://resmilitaris.net/ressources/10144/30/res_militaris_-_us_army_morale__welfare_and_recreation__mwr__programmes.pdf. If petitioners prevail in this suit, however, it will harm quality of life for many LGBT service members and military families with LGBT members, who will face discrimination as a result of where they are assigned as part of their military service. That result would harm LGBT recruitment and retention integral to national security.

Absent compulsion, people choose to live in areas that offer anti-discrimination protection. This is

especially true for LGBT people for obvious reasons: as a result, they tend to move from rural and more conservative areas and flock to cities with public accommodation protections. David Leonhardt & Claire C. Miller, TheUpshot, *The Metro Areas With the Largest, and Smallest, Gay Populations*, N.Y. Times (Mar. 20, 2015), https://www.nytimes.com/2015/03/21/upshot/the-metro-areas-with-the-largest-and-smallest-gay-population.html. There is a direct relationship between the availability of public accommodations laws and the willingness of LGBT persons to reside in a jurisdiction. Utah's experience is illustrative. When Utah passed a law prohibiting housing and employment discrimination on the basis of sexual orientation, LGBT people from Idaho, Montana, and Wyoming started moving to Utah to take advantage of the protections. *Id.*

For the military, individuals would be less willing to join or re-enlist if they could be involuntarily stationed in locations where they or their family members could be treated as second-class citizens. That result is not mere speculation. To the contrary, the military's experience under DADT establishes that disparate treatment has a direct effect on recruitment and retention. DADT "caused many [LGBT veterans] to decide not to reenlist and continue their service when they reached the end of their tours of duty or, in the case of officers, resign their commissions at the end of their obligated service." Gary J. Gates, Williams Institute, *Effects of "Don't Ask, Don't Tell" on Retention among Lesbian, Gay and Bisexual Military Personnel*" (Mar. 2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-EffectsOfDontAskDontTellOnRetention

-Mar-2007.pdf. The same study found that while DADT was in place, "an average of nearly 4,000 lesbian, gay, and bisexual military personnel each year on active duty or in the guard or reserves would have been retained if they could have been more open about their sexual orientation." *Id.* This retention problem would no doubt reemerge if petitioners prevail.

Not only would a result that harms military recruitment and retention weaken America's Armed Forces, it would impose substantial costs on the military. The negative impact on the retention of LGBT service members that resulted from DADT cost the military hundreds of millions of dollars in redundant replacement training, consuming resources that could have been directed to other national security objectives. *See Report: 'Don't Ask, Don't Tell' costs $363M*, USATODAY.com (updated Feb. 14, 2006), https://usatoday30.usatoday.com/news/washington/2006-02-14-dont-ask-report_x.htm (finding DADT cost the Pentagon $363.8 million during its first decade, including large sums for retraining replacements and discharge related expenses).

Exposing LGBT service members and military families to dignitary harm and discrimination, and making it more difficult for them to access vital goods and services, will harm those individuals' quality of life. If LGBT service members or LGBT military dependents are forced to endure added stigma and discrimination as the price for military service, it is hardly surprising that recruitment and retention will suffer and national security goals will be undermined.

CONCLUSION

The result sought by petitioners in this case would impose heightened and unique burdens on LGBT service members and military families. Those burdens, in turn, will weaken morale, harm readiness, and frustrate recruitment and retention. Such results not only would impose unconscionable harm on Americans who have committed to serve their fellow citizens, but would disserve the long-term national security interests of the United States.

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